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Before **the**
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

MESCALERO APACHE SCHOOL)

Request for Review of the Decision of)
The Universal Service Administrator)

Application File No. SLD-317139
Funding Request No. 838498

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

Changes to the Board of Directors of the)
National Exchange Carrier Association)

CC Docket No. 97-21

Schools and Libraries Universal)
Support Mechanism)

CC Docket No. 02-6

To: The Commission

APPLICATION FOR REVIEW

Mescalero Apache School (Mescalero), pursuant to Sections 1.115(a) and 54.719(c) and 1.115(a) of the Commission's Rules, 47 C.F.R. §1.115(a), 54.719(c), hereby **seeks** review of an order of the Telecommunications Access policy Division of *the* Wireline Competition Bureau (Bureau), DA 02-3509, released December 23, 2002 [hereinafter "Order"].¹ The Order denied an appeal that Mescalero timely filed on October 30, 2002 [hereinafter "Request For Review"]² and affirmed the Administrator's Decision, issued on September 11, 2002 by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company,³ that rejected Mescalero's September 10, 2002 appeal [hereinafter "Request For Administrator Review"]⁴ of

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¹ A copy of the Order (released December 23, 2002) is provided in Attachment 1.

² A copy of the Request For Review (filed October 30, 2002) is provided in Attachment 2.

³ A copy of the Administrator's Decision (issued September 11, 2002) is provided in Attachment 3.

⁴ A copy of the Request For Administrator Review (filed September 10, 2002) is provided in Attachment 4.

the Funding Commitment Decision Letter issued by the SLD on July 1, 2002.⁵ For the reasons stated below, the Commission should reverse the Order and grant Mescalero's Request For Administrator Review and Request For Review.

I. Questions Presented For Review

The questions presented for review are whether special circumstances justify consideration of Mescalero's appeal of the Funding Commitment Decision Letter and grant of its funding request. consideration of these questions is warranted because the Order contains an erroneous finding as to an important or material question of fact and conflicts with case precedent and Commission policy.

II. Special Circumstances Justify Consideration Of Mescalero's Appeal

A. Background

On February 5, 2002, the SLD addressed a Receipt Acknowledgment Letter to Mescalero to notify it that its FCC Form 471 application (Services Ordered and Certification Form), reflecting \$289,698 in pre-discount costs for internal connections (impacting 448 students) for Funding Year 5 (July 1, 2002 – June 30, 2003) had been received and the data entered (Application Number 3 17139). Attachment 3 to Mescalero's application itemized the Dell Computer servers and related software and equipment that were the subject of that application. In the Funding Commitment Decision Letter dated July 1, 2002, the SLD denied Mescalero's funding request (Funding Request Number 838498) stating, at page 6, that "[t]he service/product requested is not being used in accordance with program

By letter faxed to the SLD on September 10, 2002 [hereinafter "Request For Administrator Review"], Mescalero appealed the Funding Commitment Decision Letter. Mescalero explained that its appeal was being filed outside the 60 day because Mescalero had

⁵ A copy of the Funding Commitment Decision Letter (issued July 1, 2002) is provided in Attachment 5.
Id.

been in a transition period during the summer, “moving the entire school district including all K-12 schools into a new school facility, and the Funding Commitment Letter had not been read until August. Observing that the Funding Commitment Decision Letter was vague as to the reasons for denying the funding request, Mescalero showed that the SLD’s Eligible Services List for “internal connections” includes servers intended to serve as a conduit for information rather than as a source for content. Mescalero listed four eligible server types (Domain Name Server, E-mail Server, Terminal Server and Web Server), and stated that “[t]he servers are and will be high speed Conduits for the exchange of educational information between Teachers-Teachers, and Teacher-Student and vice versa.” Mescalero also stated, “We never intended to use the servers for any other purpose.”

On September 11, 2002, the Administrator’s Decision rejected the Mescalero’s September 10 appeal as untimely filed, and did not address the merits. The Administrator’s Decision stated, “[I]f you wish to continue this process, you may submit a new appeal via the United States Postal Service, stating the impediment to your filing your appeal within the original time...” It further stated, “**The FCC must RECEIVE your appeal WITHIN 60 DAYS OF THE ABOVE DATE ON THIS LETTER for your appeal to be considered filed in a timely fashion.**” Administrator’s Decision (emphasis in original).

Mescalero’s Request For Review was timely filed on October 30, 2002, within 60 days of the Administrator’s Decision. Mescalero further explained the circumstances surrounding its original response to the Funding Commitment Decision Letter. It explained that the entire school district had been relocated to a new facility ten miles away, that “[m]uch of the mail received during that period of time was not delivered to the appropriate offices,” and that the Funding Commitment Decision Letter was not read until August 13, the first day of school for students whose enrollment had increased by more than 200. Mescalero further stated that

All staff were working long hours just to get furniture and books in appropriate places for all students. We felt we should appeal the non-funded decision; and consulted with our service provider for advice. Dell has not been responsive to our requests for more documentation regarding equipment ordered and the uses for same. We do understand that the initial appeal was sent outside the sixty day period (12 days over); however, we had been delayed by our attempts to obtain (from Dell) information which would make it clear? that our equipment requests did indeed comply with stated guidelines and e-rate funding program intent.

Request For Review, p. 1. Again observing the vagueness of the Funding Commitment Decision Letter, Mescalero made a detailed showing that its funding request for its network infrastructure complied with the requirements of the Eligible Services List, including an attachment of its order with Dell Computer and explaining how each component satisfied eligibility requirements. Mescalero noted that it was aware that the equipment listed in its application “is the same as many other schools which did receive e-rate educational use funding” and that “Native American students deserve the same advantages afforded to other students in other schools.” Request For Review, pp. 2-4.

The Order affirmed the Administrator’s Decision and denied the Request For Review “[b]ecause the instant Request For Review was not filed within the requisite 60-day period.” The Order further held that Mescalero had not shown good cause for waiving the 60-day deadline, stating:

Waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. In requesting funds from the schools and libraries universal support mechanism, the applicant has certain responsibilities. The applicant bears the burden of submitting its appeal to SLD within the established deadline if the applicant wishes its appeal to be considered on the merits.

The particular facts of this case do not rise to the level of special circumstances required for a deviation from the general rule. In light of thousands of applications that SLD reviews and processes each year, it is administratively necessary to place on the applicant

the responsibility of adhering strictly to its filing deadlines. In order for the program to work efficiently, the applicant must assume responsibility for timely submission of its appeal to SLD if it wishes its appeal to be considered on the merits. An applicant must take responsibility for the action or inaction of those employees, consultants and other representatives to whom it gives responsibility for submitting timely appeals of SLD funding decisions on its behalf. Here, Mescalero fails to present good cause as to why it could not timely file its appeal to SLD. We therefore find no basis for waiving the appeal filing deadline.

Order, pp. 2-3 (footnotes omitted). For the reasons set forth below, the Order should be reversed and Mescalero's Request For Administrator Review and Request For Review granted.

B. Argument

As an initial matter, the basis cited in the Order for denying the Request For Review is that it "was not filed within the requisite 60-day period." Order, para. 3. That is incorrect. The Request For Review was filed on October 30, 2002, well within 60 days after issuance of the Administrator's Decision on September 11, 2002.

To the extent the Bureau refused to address the merits of Mescalero's appeal because the Request For Administrator's Review was filed outside a 60-day deadline, that decision should be reversed as well. First, the Bureau here did not reach a reasoned conclusion tied to the particular facts and circumstances of the captioned case. The Order does not explain, with any particularity, why the disruption caused by the transfer of an entire school district to a new location ten miles away, combined with a non-responsive vendor, should not constitute special circumstances and "good cause" that permit consideration of the school's appeal. Rather, the Order simply recites, in general terms, the applicant's responsibilities and the policy of strict adherence to deadline rules to reach the conclusion that Mescalero "failed to present good cause as to why it could not timely file its appeal to SLD." Order, para. 5-6.

Moreover, in other cases involving waivers of deadlines related to universal funding, the Bureau has taken into account considerations of hardship, equity, or more effective

implementation of overall policy on an individual basis.’ In *Buffalo City and Chicago Public Schools*, the Bureau applied this precept to waive deadlines where the action or inaction of a vendor was a factor in not meeting them. In those cases, the Bureau did not hold the applicant responsible for the vendor’s action or inaction. Here, the filing of Mescalero’s Request for Administrator Review was delayed because its vendor was unresponsive to its request for documentation needed to show that it complied with program requirements.’ Mescalero should not be punished for its vendor’s inaction any more than applicants in other cases.

Further, Mescalero and its students will suffer the hardship of not having access to new Domain Name, E-mail, Terminal and Web servers if the school’s appeal of the Funding Commitment Decision Letter is not considered on the merits and granted. The Commission has given special recognition to a policy of promoting Native Americans’ access to telecommunications services, a policy that should be afforded even more weight in the context of teaching Native American schoolchildren.⁹ Granting the waiver and appeal in this case will result in a more effective implementation of overall policy on an individual basis. The Order therefore should be reversed and Mescalero’s Request For Review and Request For Administrator’s Review granted.

⁷ See, e.g., *In the Matter of Buffalo City School District, Federal-State Joint Board on Universal Service*, File No. SLD-262700, CC Docket Nos. 96-45 and 97-21, Order, DA 02-1464 (Wireline Comp. Bur. Rel. June 21, 2002), para. 9 (*Buffalo City*); *In the Matter of Chicago Public Schools, Federal-State Joint Board on Universal Service*, File No. SLD-263338, CC Docket Nos. 96-45 and 97-21, Order, DA 02-1975 (Wireline Comp. Bur. Rel. August 9, 2002), para. 9 (*Chicago Public Schools*).

⁸ See also *In the Matter of Mesa Vista Consolidated Schools District, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 99-2037 (Com. Car Bur. rel. September 30, 1999), para. 8 (delay caused by vendor ceasing business).

⁹ See *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207 (rel. June 23, 2000).

Respectfully submitted,
MESCALERO APACHE SCHOOL DISTRICT

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